Case No. 83-1461

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MIGUEL A. GARGALLO,
Petitioner,

v.

FRANKLIN COUNTY COURT OF COMMON PLEAS, DOMESTIC RELATIONS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF IN OPPOSITION

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RESPONDENTS JOINED IN THIS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Franklin County Court of Common Pleas, Division of Domestic Relations, Honorable John W. Hill, Honorable Clayton W. Rose, Jr., Honorable Winston C. Allen, Honorable Richard H. Finefrock, Honorable Guy G. Cline, Franklin County Court of Common Pleas, Criminal Division, Honorable Frederick T. Williams, Franklin County Municipal Court, Honorable Leo P. Stark, Honorable Gervais W. Fais, Honorable Frank A. Reda, Honorable Georgena Howell, Honorable Joseph M. Clifford, Franklin County Court of Appeals, Honorable Alba L. Whiteside, Honorable Dean Strausbaugh, Honorable Robert E. Holmes, Honorable Archer E. Reilly, George C. Smith, Marvin A. Romanoff, Thomas J. Enright, and Richard D. Coe.

Stephen Michael Miller, Prosecuting Attorney, Franklin County, Ohio, is Counsel of Record for the above Respondents.

William L. Millard and Wilmore Brown.

William L. Millard, Esq., is Counsel of Record for Respondents Millard and Brown.

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion and order of the District Court for the Southern District of Ohio, Eastern Division, is reported at page A-1 of the Appendix. The order of the Court of Appeals for the Sixth Circuit is reported at page A-6 of the Appendix.

STATEMENT OF THE CASE

Respondents would supplement Petitioner's Statement of the Case by noting that Petitioner has twice previously attempted to relitigate his divorce proceedings in the Federal Courts in *Gargallo v. Gargallo*, 487 F. 2d 914 (6th Cir. 1973) and *Gargallo v. Gargallo*, 472 F. 2d 1219 (6th Cir.) *certiorari denied*, 414 U.S. 805 (1973).

ARGUMENT

This Honorable Court should deny Petitioner's request for a Writ of Certiorari because the decisions of the Fourth Circuit and Sixth Circuit Courts of Appeal are not in conflict.

The Sixth Circuit properly held that Petitioner merely seeks to relitigate a domestic relations action in the Federal Courts. The Courts below followed the rule in *Wilkins v. Rogers*, 581 F. 2d 399 (4th Cir. 1978) at p. 404:

> "It has long been held that the whole subject of domestic relations belongs to the laws of the state and not to the laws of the United States. ... And, such disputes do not present a federal question, notwithstanding allegations of sexual discrimination."

Petitioner's characterizations notwithstanding, the Fourth and Sixth Circuits are not in conflict regarding this rule. The Fourth Circuit chose not to apply the domestic relations exception to federal jurisdiction in *Cole v. Cole*, 633 F. 2d 1083 (4th Cir. 1980) where the plaintiff's former spouse and two law enforcement officers allegedly conspired to deny plaintiff of his civil rights.

In his claims against defendants, plaintiff alleged that he was burned, beaten, harrassed, arrested and abused. The Fourth Circuit held that the allegations of the Complaint stated a claim for relief under the Civil Rights Act, 42 USC Section 1983, because the alleged conduct was not closely related to the earlier domestic relations action.

The Fourth Circuit did, however, approve the rule set forth in *Wilkins, supra,* stating:

> "In granting diversity jurisdiction to the district courts, Congress did not authorize them to declare *ab initio* litigants' rights and duties under family relations laws."

Consequently, both Circuits follow the same rule. The results in *Cole, supra,* and the case *sub judice* differ because the facts of the two cases are markedly different.

Petitioner argues exclusively that this Honorable Court should grant certiorari to dispel a conflict between the Fourth and Sixth Circuits. Because both Circuits recognize that the state courts are the proper forum for domestic relations disputes, petitioner's request should be denied.

Significant in the case *sub judice* is the statement by the Sixth Circuit in *Firestone v. The Cleveland Trust Co.* 654 F. 2d 1212 (6th Cir. 1981) at p. 1216:

> "It is incumbent upon the district court to sift through the claims of the complaint to determine the true character of the dispute to be abjudicated. ..."

CONCLUSION

WHEREFORE, Respondents pray that this Honorable Court deny the issuance of a Writ of Certiorari.

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Joint Brief In Opposition were mailed to Miguel A. Gargallo, Petitioner Pro Se, P.O. Box 02177, Columbus, Ohio 43202; Barbara A. Gates, Assistant City Attorney, 90 West Broad Street, Columbus, Ohio 43215; Gerald A. Erhard, Jr., Assistant Prosecuting Attorney, Court House, Newark, Ohio 43055; Thomas M. Tyack, 536 South High Street, Columbus, Ohio 43215; and William L. Millard, 155 East Broad Street, Columbus, Ohio 43215, by regular United States Mail this 6th day of April, 1984.

STEPHEN MICHAEL MILLER

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MIGUEL A. GARGALLO
Plaintiff

vs. Civil Action C-2-79-483

FRANKLIN COUNTY COURT OF
COMMON PLEAS, et al.
Defendants

OPINION AND ORDER
Filed June 14, 1982

Plaintiff alleges in this complaint under 42 U.S.C. §1983 that the defendants subjected him to sexual discrimination during the course of his divorce proceedings. Named as defendants are the Franklin County Court of Common Pleas, Division of Domestic Relations; the Franklin County Court of Common Pleas, Criminal Division; the Franklin County Municipal Court of Columbus; the Franklin County Court of Appeals; several judges from the above named courts; Judge Allen of the Licking County Court of Common Pleas; the former Franklin County prosecuting attorney and an assistant prosecuting attorney; the former city attorney and assistant city attorney; the Clerk of Court for the Franklin County Court of Common Pleas and a deputy clerk; and four private attorneys, Philip Bradley, Paul Scott, Wilmore Brown and William Millard. Plaintiff has already litigated at least two prior actions concerning his divorce proceedings. See, *Gargallo* v. *Gargallo*, 472 F.2d 1219 (6th Cir.) *cert. denied*, 414 U.S. 805 (1973); *Gargallo* v. *Gargallo*, 487 F.2d 914 (6th Cir. 1973).

The defendant Franklin County courts and judges move to dismiss this complaint for lack of jurisdiction and failure to state a claim for relief. The same grounds for dismissal are asserted by the Franklin County Clerk of Court and the former prosecuting attorney. Judge Allen of the Licking County Court of Common Pleas moves to dismiss the complaint on the basis of judicial immunity. Attorney Philip Bradley moves to dismiss this action for lack of jurisdiction and failure to state a claim for relief, or in the alternative, he moves for a more definite statement. Attorney Paul Scott moves to dismiss it on the ground that this action is barred by the applicable statute of limitations. Attorneys Brown and Millard move to dismiss the complaint for lack of jurisdiction and failure to state a claim for relief. Former City Attorney James Hughes moves to dismiss it for lack of jurisdiction and on the basis of prosecutorial immunity, and in the alternative, he moves for summary judgment.

The Court will first address the issue of jurisdiction. Defendants contend in their various motions that plaintiff is essentially alleging a domestic relations action, seeking to relitigate the domestic relations proceedings that occurred in the state courts. They argue that this court does not have subject matter jurisdiction over this action even though the plaintiff has attempted to raise a federal question.

The United States Court of Appeals for the Sixth Circuit held in *Firestone* v. *The Cleveland Trust Company*, 654 F.2d 1212, 1215 (6th Cir. 1981), that:

> Even when brought under the guise of a federal question action, a suit whose substance is domestic relations will not be entertained in a federal court.

In such a situation, "[i]t is incumbent upon the district court to sift through the claims of the complaint to determine the true character of the dispute to be adjudicated." *Id.* If the suit essentially concerns a domestic relations matter, then the

federal court must dismiss it for lack of subject matter jurisdiction. *See also, Gargallo* v. *Gargallo, supra; Hernstadt* v. *Hernstadt,* 373 F.2d 316 (6th Cir. 1967); *Wilkins* v. *Rogers,* 581 F.2d 399 (4th Cir. 1978).

The Court has carefully read and considered this rather long and discursive complaint and concludes that it is essentially alleging a domestic relations matter. The complaint recounts the extensive litigation involved in plaintiff's divorce proceedings, and details various errors on the parts of the defendant courts and judges. It alleges that plaintiff's attorneys made mistakes handling the suit. The complaint further alleges that the defendants conspired to have plaintiff prosecuted for a misdemeanor offense and then a felony offense, but that the charge was later dropped. And the complaint generally alleges that throughout the course of the litigation, plaintiff was subjected to sexual discrimination because he was a man.

It is apparent that plaintiff wishes to re-litigate his state divorce proceedings in the present action. The broad, conclusory assertion that plaintiff was subjected to discrimination because he was a man does not save the complaint. This complaint essentially concerns a domestic relations dispute, and consequently this Court lacks subject matter jurisdiction over the action. *Firestone* v. *The Cleveland Trust Company, supra.* Accordingly, defendants' motion to dismiss is meritorious; and, therefore, it is GRANTED.

Moreover, since the judges were acting in a judicial capacity at all times relevant to the allegations in the complaint and they all were acting within their general jurisdiction, the Court finds that the defendant judges are protected from the claims for money damages by judicial immunity. *Stump* v. *Sparkman,* 435 U.S. 349, 359-360 (1978); *Pierson* v. *Ray,* 386 U.S. 547 (1967); *Castorr* v. *Brundage,* ____ F.2d ____ (6th Cir. March 23, 1982). Similarly, since the prosecuting attorneys, the Franklin County prosecutor and the city attorney and their assistants, acted within a judicial func-

tion in prosecuting plaintiff for the nonsupport offense, they are protected by prosecutorial immunity. *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976); *Macko* v. *Bryon*, 641 F.2d 447, 449 (6th Cir. 1981).

Attorney Paul Scott's motion to dismiss because the suit against him is barred by the statute of limitations is meritorious. Since §1983 does not have a statute of limitations, a federal district court must apply the statute of limitations of the state where it sits which would apply to the most closely analogous state action. *Carmicle* v. *Widdle*, 555 F.2d 554, 555 (6th Cir. 1977); *Austin* v. *Brammer*, 555 F.2d 142 (6th Cir. 1977).

Plaintiff alleges that defendant Scott subjected him to sex discrimination through his actions during the litigation and that he acted in concert with the others to have criminal charges brought against him. These allegations are most closely analogous to a personal injury action or malicious prosecution. Under §2305.10, Ohio Revised Code, a personal injury action has a two year statute of limitations, and under §2305.11, malicious prosecution has a one year statute of limitations. Since the averments in the complaint concern Scott's actions in 1975 at the latest, applying either of Ohio's applicable statutes of limitations, this action, which was filed May 29, 1979, is barred by the statute of limitations.

Defendants Hughes and Garlinger, the former city attorney and assistant city prosecutor, move for summary judgment based upon the statute of limitations. The only allegations about them concern the institution of criminal charges against plaintiff, and the Court finds the most closely analogous state action is malicious prosecution. Consequently, a one year statute of limitations applies. Hence, the statute of limitations bars this suit against defendants Hughes and Garlinger.

For the reasons set out above, the Court HOLDS that all of the motions to dismiss are meritorious; and, therefore, they are GRANTED.

This action is hereby DISMISSED. The Clerk of Court shall enter JUDGMENT for the defendants.

/s/ Joseph P. Kinneary
United States District Judge

No. 82-3453
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MIGUEL GARGALLO,
Plaintiff-Appellant,

v.

FRANKLIN COUNTY COURT
OF COMMON PLEAS, DIV.
OF DOMESTIC RELATIONS,
ET AL.,
Defendants-Appellees.

ORDER
Filed October 20, 1983

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

BEFORE: MARTIN and CONTIE, Circuit Judges; and PHILLIPS, Senior Circuit Judge

The plaintiff has appealed from the district court's judgment for defendants in this civil rights action challenging cer-

tain domestic relations proceedings conducted in the Ohio courts. Briefs have been filed and the matter is now before the Court for consideration pursuant to Sixth Circuit Rule 9(a).

This Court has carefully considered the record and the briefs filed herein and has concluded that the plaintiff's claims, even when liberally construed as mandated by *Haines v. Kerner*, 404 U.S. 519 (1972), were insufficient to entitle him to relief under the federal civil rights statutes. The Court further concludes that the district court was correct in determining that the plaintiff's claims presented domestic relations issues more appropriately considered by the state courts. See *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978); *Firestone III v. Cleveland Trust Co.*, 654 F.2d 1212 (6th Cir. 1981).

Therefore, this panel having agreed unanimously that oral argument is not needed, Rule 34(a), Federal Rules of Appellate Procedure,

It is ORDERED that the judgment of the district court is affirmed pursuant to Sixth Circuit Rule 9(d)(3).

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ISSUED AS MANDATE: November 11, 1983
COST: None